

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE CORTEZ MARTIN,

Defendant-Appellant.

UNPUBLISHED

May 21, 1999

No. 207461

Recorder's Court

LC No. 96-005445

Before: Griffin, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals of right from his convictions of two counts of felonious assault, MCL 750.82; MSA 28.277, and one count of habitual offender, fourth offense, MCL 769.12; MSA 28.1084, entered after a bench trial. We affirm.

The prosecution's theory underlying the charges of felonious assault was that defendant intentionally drove his vehicle into the vehicle occupied by complainants. Defendant's trial took place over three non-consecutive days. On the first day, defendant was present for the testimony of one complainant (the other complainant being unavailable due to military service) and of two witnesses to the aftermath of the accident. On the second day, defendant was absent for the testimony of the police officers who responded to the scene of the accident. The trial court denied defense counsel's request for a delay. On the third day, defendant was present and indicated that he had missed the second day's proceedings due to a broken leg. Defendant testified on his own behalf. The trial court rejected defendant's contention that the collision had been accidental, and found him guilty of two counts of felonious assault. Subsequently, the court sentenced defendant as an habitual offender to thirty-two to forty-eight months in prison.

A criminal defendant has both a constitutional and a statutory right to be present at his trial. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.3; MSA 28.1026. A defendant may waive his right to be present by failing to appear at trial. For a waiver to be valid, a defendant must have had specific knowledge of the right to be present, and must have intentionally abandoned that right. If either element is missing, the waiver is not valid. *People v Woods*, 172 Mich App 476, 478-479; 432 NW2d 736 (1988). If the record is silent concerning whether the defendant's absence was voluntary or whether the

defendant knew of and intentionally abandoned his right to be present, a valid waiver cannot be presumed. The test for whether the defendant's absence mandates reversal is whether there was any reasonable possibility that the defendant was prejudiced by the absence. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995).

Defendant argues that he is entitled to a new trial because he was absent for a portion of the proceedings. We disagree and affirm. Because the record is silent as to whether defendant had a specific understanding of his right to be present on the second day of trial and as to whether he intentionally abandoned that right, a valid waiver cannot be presumed. *Armstrong, supra*. Nevertheless, reversal is not required. In making its findings of fact and conclusions of law, the trial court did not rely heavily on the testimony given by the witnesses who appeared during defendant's absence. Defendant and complainant Johnson were the only eyewitnesses to the accident to testify at trial. Defendant was present for Johnson's testimony, and returned to the proceedings to testify on his own behalf. The trial court rejected defendant's contention that the collision was accidental, and found that he intentionally struck complainants' vehicle with his vehicle. This case involved questions of witness credibility. Defendant was present for the testimony that proved critical to the trial court's finding of guilt. We conclude that no prejudice resulted from defendant's absence from the second day of the proceedings. Defendant's absence made no difference in the result. *Armstrong, supra*, at 130.

Affirmed.

/s/ Richard Allen Griffin

/s/ Mark J. Cavanagh

/s/ E. Thomas Fitzgerald